IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 941 OF 2005

Sukesh M. Khanna .. Appellant

Vs.

The Union of India & Ors. .. Respondents

Mr. Navin Parekh with Ms. Hetal Patel for the appellant.
Mr. Suresh Kumar for the Respondents.

CORAM: B.H. MARLAPALLE, J.
Date : October 13, 2005.

P.C.:

1. Heard Mr. Parekh with Ms. Patel the learned counsel for the appellant-plaintiff and Mr. Suresh Kumar the learned counsel for the respondents.

2. The plaintiff is the proprietor of M/s. Magna Sites which is engaged in the business of taking on contract advertisement sites for being hired out to various advertisers. It had entered into agreements with the General Manager of Western Railways in respect of the advertisement sites located in different properties of Western Railways in Mumbai. In July 2005 the Railways invited tenders for fresh

bids in respect of its sites to be given on contract for advertisements and the last date for collecting tenders was 26/7/2005. After the tenders were opened on 16/8/2005 and successful bidders were notified in majority of the cases, the plaintiff approached the City Civil Court at Mumbai and filed S.C. Suit No.3687 of 2005 for the following reliefs:-

> (a) that this Hon'ble Court be pleased to declare that inviting quotations/floating for:
>
> I. (i) 1 hoarding at Marine Lines at Sr.No.1 and
>
> (ii) 2 hoardings at Charni Road at Sr.Nos.12 and 14 in the List of Hoardings under Tender No. CA/11/13/Bulk-hdg MEL to Bct-Group-I.
>
> II. (i) 4 hoardings at Mahalaxmi at Sr.Nos. 3,5, 10 and 13.
>
> (ii) 1 hoarding at Dadar at Sr.No.28 under Tender No.CA/11/13/Bulk-hdg MX to DDR-Group II.
>
> III. (i) 3 hoardings at Mahim at Sr.Nos.113, 13 and 14 and
>
> (ii) 1 hoarding at Bandra Station (W) at Sr.No.24 under Tender No.CA/11/13/Bulk-Hdg Group III.
>
> IV. 8 hoardings at Road Over Bridge (ROB) at Bandra at Sr.Nos.9, 11 and 14 under Tender No.CA/11/13/Bulk-Hdg Group IV and

V. 1 hoarding at Goregaon Station (W) at Sr.No.11 under Tender No.CA/11/13/Bulk-Hdg Group VII

was illegal, unlawful, void and liable to be set aside.

3. Notice of Motion No.3334 of 2005 came to be filed in the said suit for a temporary injunction seeking to prevent/restrain the Railways from acting on the finalised tenderers or from taking away the sites already in possession of the plaintiff and as noted hereinabove. By the impugned order dated 11/10/2005 the learned Judge of the Trial Court has dismissed the said Notice of Motion.

4. The plaintiff challenged the action of the Railways in inviting fresh tenders on several grounds, namely, that the action suffers from the vice of unfairness and arbitrariness, the orders passed by this court from time to time in PIL Petition No.1132 of 2002 impliedly did not permit the Railways to take away the sites from the plaintiff’s contract and allot them to some other parties unless these orders were vacated or stayed by the Apex Court, the plaintiff had made huge investments on putting up permanent

structures on different locations and by offering the sites to third parties at this juncture would amount to causing irreparable loss to the plaintiff and by the proposed action the Railways was encouraging the monopoly of selected advertisers who have the financial capacity to bid for very heavy amounts running into few crores and thus creating a cluster of monopoly thereby driving away the small advertisers in the field.

5. When a civil suit is filed before the trial court, for prima facie considerations to injunct the defendants, the court is required to examine the contractual terms between the parties and in the instant case the trail court noted that the initial contract between the plaintiff and the defendants was for a period of five years and the same expired in the year 1997. On expiry of this initial period of five years, from time to time the contract was renewed and in any case when the fresh tenders were invited the contract period had expired in most of the cases. The terms of contract did not create a right in favour of the plaintiff to remain on the site forever nor did

these terms take away the right of the Railways to offer the sites in public auction so as to earn higher revenue. It also noted that the agreement between the parties provided for a clause of arbitration in case there was any dispute between the parties while implementing the terms of the contract.

6. After considering the rival arguments advanced before it at length, the trial court set out its reasoning in para 4 of its impugned order to dismiss the Notice of Motion and the relevant portion of the same reasoning is reproduced hereinbelow:-

> "4. In the present case, it is not in dispute that contract between the parties in respect of hoarding sites are executed since year 1992-1997 and the hoardings in question are used by the plaintiff for their advertisements for more than five years. Some hoardings are used by the plaintiff for about ten years also. There is also no dispute that the terms and conditions between the parties are reflected in the contract which is at Exhibit "A" to the Plaint. Term Clause 2 in the said Clause is material and to my mind, it is better to reproduce the said term which runs as under :-
>
> > CLAUSE 2:"The order is given and accepted on the understanding that if from any cause any or all the advertisements be and not exhibited or

> if the Railway should be unable from any cause to continue to exhibit the advertisements for the full term of the contract, the Railway will allow a proportionate abatement of the rent for the period of non-exhibition, but no other claim on account of non-exhibition will be admissible".

In short, the said term shows that at any time, defendants can ask the plaintiff to quit and the only remedy available to the plaintiff is to ask for refund of money for not allowing him to exhibit the advertisements. There is no dispute that defendants have accepted the payment from the plaintiff from time to time. However, letter received by the plaintiff from the defendants shows that payments are accepted by the defendants till finalisation of the tender or till the duration of the contract period whichever is earlier, it means that plaintiff was aware that these payments are accepted by the defendants subject to certain conditions. Therefore, to my mind, though payments have made to the defendants from time to time for a future period, that aspect is not be coming to the help of the plaintiff in asking relief in this notice of motion. Once plaintiff is entitled for refund of the money, to my mind, losses sustained by the plaintiff can be compensated in terms of money."

7. The learned counsel for the defendants, by referring to the Written Statement filed before the trial court, pointed out that the orders passed by this court from time to time do not come in the way of the Railways from inviting fresh tenders in respect of different locations of advertisements in its

properties located in Mumbai and the successful bidders have already been handed over the sites, though not in all cases, and the suit came to be filed after the tenders were opened on 16/8/2005. It is also pointed out that the plaintiff did not participate in the bid by submitting its tender. The view taken by the trial court in these obtaining circumstances cannot be termed as illegal or perverse and, in fact, the trial court has set out cogent reasons in refusing to grant the order of temporary injunction in favour of the plaintiff. Challenge to the said order is, therefore, devoid of merits and this appeal must fail at the threshold.

8. The appeal is hereby dismissed in limine.

9. Mr. Parekh at this juncture prayed that Railways should give some time to the plaintiff to remove its hoarding from the respective sites. It is for the Railways to consider such a request on the representation being made by the plaintiff and the same cannot be considered in this appeal. If the plaintiff applies to the Railways, the Railways to

consider the same on its own merits and in consonance with the rules, if any, and the conditions of contract between the parties.

(B.H. Marlapalle,J.)